

1 Brian S. Kabateck, SBN 152054
2 (bsk@kbklawyers.com)
3 Richard L. Kellner, SBN 171416
4 (rlk@kbklawyers.com)
5 Evan M. Zucker, SBN 266702
6 (ez@kbklawyers.com)
7 KABATECK BROWN KELLNER LLP
8 644 South Figueroa Street
9 Los Angeles, California 90017
10 Telephone: (213) 217-5000
11 Facsimile: (213) 217-5010

12 Attorneys for Plaintiffs, on behalf of themselves
13 and all others similarly situated

14 **UNITED STATES DISTRICT COURT**

15 **NORTHERN DISTRICT OF CALIFORNIA**

16 CLIFFORD MCKENZIE, DANIEL
17 BIDDIX, ROBIN BIDDIX, DAVID
18 KIBILOSKI, AND VIRGINIA
19 RYAN on behalf of themselves and
20 all others similarly situated;

21 Plaintiff,
22 vs.

23 WELL'S FARGO HOME
24 MORTGAGE, INC., a California
25 corporation; WELL'S FARGO
BANK, N.A., WELL'S FARGO &
COMPANY, WELL'S FARGO
INSURANCE, INC., and DOES 1
through 10 inclusive;

26 Defendants.

27 CASE NO. 4:11-CV-04965-YGR

28 **JOINT CASE MANAGEMENT
CONFERENCE STATEMENT**

Date: May 7, 2012
Time: 2:00 p.m.

Assigned to the Hon. Yvonne Gonzalez
Rogers

22 Having conferred per the Court's Notice and the Northern District of
23 California's Standing Order, counsel for all parties respectfully submit this
24 Joint Case Management Conference Statement.

25 1. Jurisdiction and Service: All parties to this matter have been
26 served with the complaint. The Court has subject matter jurisdiction over this
27 case based upon federal question jurisdiction in connection with the Plaintiffs'
28

1 claims under the Truth in Lending Act, 12 U.S.C. §1601. The Court also has
2 diversity jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C.
3 §1332(d)(2) because the amount in controversy is in excess of \$5,000,000.
4 The Court has supplemental pendent jurisdiction over the state law claims at
5 issues pursuant to 28 U.S.C. § 1367. There are no personal jurisdiction or
6 venue issues.

7 2. Facts:

8 Plaintiffs' Statement:

9 Plaintiffs are homeowners who entered into mortgage transactions or
10 who have a home loan serviced by Defendants. Plaintiffs' properties are
11 located in Special Flood Hazard Areas ("SFAs") as defined by the Federal
12 Emergency Management Agency ("FEMA") and require maintenance of flood
13 insurance in the minimum amount required under federal law. Defendants'
14 force-placed unnecessary flood insurance coverage in excess of the amount
15 required under law and in excess of what was provided in their respective
16 contractual agreements with Plaintiffs and those similarly situated.

17 Defendants also misrepresented the amount of flood insurance required by law
18 and the contractual agreements. In addition, Defendants force-placed
19 insurance to meet their unnecessary, unreasonable and excessive flood
20 insurance requirements at rates inflated by an improper and illegal kickback
21 scheme with their captive insurance provider(s).

22 Defendants represented to Plaintiffs and the Class that the amount of
23 flood insurance required is equal to the replacement value of the property.
24 The National Flood Insurance Act and the form contractual agreements at
25 issue, however, require flood insurance equal to the lesser of: (1) the
26 maximum insurance coverage against through the NFIP [\$250,000]; (2) the
27 outstanding balance of the loan; or (3) the replacement cost of the property.

1 Plaintiff McKenzie maintained insurance in excess of the value of his
2 property but was still force-placed with an unnecessary flood insurance policy
3 at excessive rates by Defendants.

4 Plaintiffs Biddix were informed in a letter, despite their loans not
5 requiring flood insurance at inception, that they were required to procure flood
6 insurance. Defendants subsequently force-placed an unnecessary and
7 excessive flood insurance policy with coverage equal to more than the value
8 of the outstanding balance of their loan. Defendants further misrepresented
9 that this was a requirement under NFIP.

10 Plaintiffs Kibilosky and Ryan maintained the amount of flood insurance
11 coverage required by their Notice of Special Flood Hazards issued at loan
12 origination. Plaintiffs were later presented with materially misleading and
13 deceptive letters instructing them that Defendants would force-place flood
14 insurance despite the fact that they already carried the required amount of
15 flood insurance. Defendants then force-placed an excessive and unnecessary
16 flood insurance policy despite Plaintiffs' offer of proof that they already
17 maintained proper flood insurance coverage.

18 Defendants' Statement:

19 Defendants deny that they have taken any course of action which would
20 invoke any liability under the theories espoused by Plaintiffs. The principle
21 federal statutes, all of the controlling federal regulations, as well as federal
22 agency interpretation are opposed to the theory espoused by Plaintiffs in this
23 action. Relying on a misinterpretation of the federal flood statute's
24 requirements, all of Plaintiffs' legal theories, including their state law claims,
25 fail as a matter of law. Further, Defendants' actions are consistent with the
26 parties' agreements.

1 3. Legal Issues: Plaintiffs allege seven (7) causes of action: (1)
2 Violation of the Truth In Lending Laws, 15 U.S.C. 1601, *et seq.*; (2) Breach of
3 Contract; (3) Violation of the Real Estate Settlement Procedures Act
4 (“RESPA”); (4) Unjust Enrichment; (5) Breach of Fiduciary Duty; (6)
5 Conversion; and (7) Violation of the New Mexico Unfair Trade Practices Act.
6 Plaintiffs believe that Defendants’ conduct as set forth in their Second
7 Amended Complaint supports a finding of liability with respect to each of the
8 above-identified causes of action. Defendants deny this contention.

9 4. Motions: Defendants filed a motion to dismiss this action, which
10 was decided as moot upon the filing of Plaintiffs’ Second Amended
11 Complaint. Defendants anticipate filing a motion to dismiss the Second
12 Amended Complaint as well as a Motion for Summary Judgment if necessary.
13 Defendants also reserve their right to file a motion for transfer venue based
14 upon inconvenient forum, as none of the Plaintiffs are from California and
15 many of Defendants witnesses and documents are in the Midwest. Plaintiffs
16 anticipate filing a Motion for Class Certification and a Motion for Summary
17 Judgment, as warranted by the record developed through discovery.

18 5. Amendment of Pleadings: The parties propose June 3, 2012 as
19 the deadline for amending the pleadings.

20 6. Evidence Preservation: Both parties agree to take reasonable
21 steps within normal business practices and the Federal Rules of Civil
22 Procedure to maintain and preserve all potentially relevant evidence for trial,
23 including both hard copy and electronically stored information.

24 7. Disclosures: The parties are in the process of disclosing all
25 necessary information pursuant to Fed. R. Civ. P. 26(a) and such will be
26 completed by June 1, 2012.
27

1 8. Discovery:2 Plaintiffs' Statement:

3 Discovery should be open for all purposes. Courts in the Ninth Circuit
4 have repeatedly found it improper to bifurcate class and merits discovery.

5 *See, e.g., Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 41 (N.D. Cal. 1990)
6 (“[a]n order restricting discovery to class issues would be impracticable
7 because of the closely linked issues, and inefficient because it would be
8 certain to require ongoing supervision of discovery”); *Barnhart v. Safeway*
9 *Stores, Inc.*, No. S92-0803 WBS, 1992 WL 443561, at *3, 9 (E.D. Cal. Dec.
10 14, 1992) (declining to limit discovery to “class” related matters).

11 Because there is significant overlap among the issues relevant to class
12 certification and class liability, any attempt to bifurcate discovery will also
13 result in much greater inefficiency and is likely to generate endless disputes
14 about line-drawing in this case. As the Manual for Complex Litigation –
15 Fourth recognizes, “information about the nature of the claims on the merits
16 and the proof they require is important to deciding certification. Arbitrary
17 insistence on the merits/class discovery distinction sometimes thwarts the
18 informed judicial assessment that current class certification practice
19 emphasizes.” *See* Federal Judicial Center, Manual for Complex Litigation –
20 Fourth, § 21.14 (2005).

21 Discovery is expected to cover, among other things, Defendants’
22 policies, practices and procedures regarding their force-placement of flood
23 insurance, the implementation of those policies and procedures, as well as the
24 amount and character of the flood insurance policies that Defendants force-
25 placed and Defendants’ relationships to Plaintiffs and the Class. Plaintiffs
26 further seek information on compensation and other financial or non-financial
27 benefits that Defendants received from the applicable insurance companies in

1 connection with Defendants' force-placed insurance program as well as
2 Defendants relationships to various insurers, investors and mortgage servicing
3 and regulating entities.

4 Plaintiffs anticipate needing to exceed the deposition limit set forth in
5 Fed. R. Civ. P. 30, and will need to take numerous depositions, including Rule
6 30(b)(6) depositions of Defendants on a number of topics, as well as
7 depositions of current or former employees who had roles in, among other
8 things, creating, implementing, designing or servicing Plaintiffs and the
9 Class's loans and the force-placed flood insurance scheme that emanated.
10 Plaintiffs will also seek to depose representatives of third parties who have
11 relevant information about Defendants' policies and procedures at issue, and
12 the implementation of those policies and procedures regarding the force-
13 placement of flood insurance

14 Defendants' Statement

15 (1) Defendants anticipate that discovery will cover each of the named
16 Plaintiffs' transactions with Defendants regarding insurance as well as each of
17 the Plaintiffs' suitability to be a class representative as well. (2) Defendants
18 also believe that Plaintiffs should be allowed to conduct properly tailored,
19 reasonably discovery directed to Defendants' procedures for flood insurance
20 and lender placement of flood insurance. (3) In addition, Defendants believe
21 that damages discovery should be deferred until after the decision on class
22 certification. (4) Defendants believe that it is inappropriate for Plaintiffs to
23 assert at this juncture "needing to exceed the deposition limits set forth in Fed.
24 R. Civ. P. 30" as indicated above. Defendants see no reason for this and
25 propose that, if the issue arises the parties shall meet and confer regarding the
26 subject.

27
28

1 9. Class Actions: Plaintiffs anticipate filing their Motion for Class
2 Certification after the pleadings are resolved and after an adequate time for
3 discovery. The parties propose a deadline for Plaintiffs to file their Motion for
4 Class Certification on or before January 7, 2013, with the opposition to such
5 motion being due 45 days thereafter and the reply being due 35 days after the
6 filing of the opposition.

7 10. Related Cases: The parties do not believe that there are any
8 related cases.

9 11. Relief: Plaintiffs request relief according to proof at trial. Relief
10 is expected to include damages, restitution, penalties and injunctive relief to
11 remedy the conduct alleged in Plaintiffs' Second Amended Complaint. The
12 exact damages are unknown at this time (and require discovery) but include
13 all excess premiums incurred for improperly placed flood insurance as well as
14 the disgorgement and restitution of all kickbacks received by Defendants as
15 alleged in the Second Amended Complaint. In addition, Plaintiffs seek
16 attorneys' fees and costs as well as punitive damages and interest as a result of
17 Defendants' conduct. Defendants deny that any such relief should be had by
18 Plaintiffs, as there is no basis for any liability.

19 12. Settlement and ADR: The parties believe that private mediation
20 would be the most efficient and effective ADR resolution method for this
21 matter. However, the parties believe that it is premature to incur the expense
22 of mediation prior to, at a minimum, development of preliminary discovery
23 related to the Defendants' practices, policies and procedures with regard to
24 force placements of flood insurance and size and scope of the purported class
25 at issue.

26
27
28

1 13. Consent to Magistrate Judge for All Purposes: The parties do not
2 consent to a magistrate judge for all purposes, including trial and entry of
3 judgment.

4 14. Other References: The parties do not believe other references are
5 suitable for this case.

6 15. Narrowing of Issues: The parties do not believe that there are any
7 stipulations or agreements available to narrow the issues at this time. The
8 parties do not believe that any form of bifurcation is suitable for this matter.

9 16. Expedited Trial Procedure: The parties do not believe that this
10 case is suitable for an expedited trial procedure.

11 17. Scheduling: Because the determination of Plaintiffs' Motion for
12 Class Certification will have a significant impact on the presentation of issues
13 at trial in this case, the parties agree that the scheduling of the deadlines for
14 designation of experts, discovery cutoff, dispositive motion cutoff, pretrial
15 conference and trial should be postponed until after class certification has
16 been decided.

17 18. Trial: The parties request a jury trial. Defendants anticipate the
18 trial to take between 21-30 days. Plaintiffs anticipate the trial taking
19 approximately 10 days.

21 19. Disclosure of Non-party Interested Entities or Persons:
22 Plaintiffs' statement: Plaintiffs do not have any interested entities or
23 persons to disclose

24 Defendants' statement: Defendants have those interested entities or
25 persons as will be stated in their Rule 7.1 statement in this case.

1 20. Other Matters: The parties do not have any other matters to
2 identify at this time.

3 Dated: May 4, 2012

KABATECK BROWN KELLNER LLP

5 By: /s/ Evan M. Zucker

6 Richard L. Kellner
7 Evan M. Zucker

8 FEAZELL & TIGHE, LLP

9 Austin Tighe
10 6618 Sitio Del Rio Boulevard
11 Building C-101
12 Austin, Texas 78730
13 Tel: (512) 372-8100
14 Fax: (512) 372-8140
15 austin@feazell-tighe.com

16 BERGER & MONTAGUE, P.C.

17 Shanon J. Carson (pro hac vice
18 application forthcoming)
19 Patrick F. Madden (pro hac vice
20 application forthcoming)
21 1622 Locust Street
22 Philadelphia, PA 19103
23 Telephone: (215) 875-4656
24 Facsimile: (215) 875-4604
25 Email: scarson@bm.net
26 pmadden@bm.net

27 TAUS, CEBULASH & LANDAU, LLP

28 Brett Cebulash (pro hac vice
29 application forthcoming)
30 Kevin S. Landau (pro hac vice
31 application forthcoming)
32 80 Maiden Lane, Suite 1204
33 New York, NY 10038
34 Telephone: (212) 931-0704
35 Facsimile: (212) 931-0703
36 Email: bcebulash@tcllaw.com
37 klandau@tcllaw.com

38 Attorneys for Plaintiffs on behalf of
39 himself and all others similarly
40 situated

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SEVERSON & WERSON
A Professional Corporation

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
By: /s/ Philip Barilovits
Philip Barilovits

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
Attorneys for Defendants